LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 21 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 419

BEN LAPENSOHN, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

BRIEF OF COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARLEN SPECTER
Assistant District Attorney

F. EMMETT FITZPATRICK, JR.
First Assistant District Attorney

JAMES C. CRUMLISH, JR.
District Attorney

Room 666, City Hall
Philadelphia, Pa. 19107

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

TABLE OF CONTENTS

	Page
Statement of the Case	1
Argument	3
I. This Case Presents No Federal Question and No Important Issue of Any Kind	3
II. The Specific Reasons Advanced by Petitioner Do Not Justify Review by This Court	4
A. Petitoner's Rights Were Not Violated by Use of the District Attorney's Bill of Indictment Instead of a Preliminary Hearing	4
B. Petitioner Was Not Deprived of a Fair Trial or a Fair and Impartial Arbiter	9
C. Petitioner Was Not Deprived of Effective Assistance of His Counsel	15
D. The Holding of the Superior Court on the Statute of Limitations Issue Does Not Violate the Fourteenth Amendment	18
E. Petitioner Was Not Prevented from Selecting a Fair Jury	19
F. The Evidence Conclusively Demonstrated Petitioner Was Guilty of Conspiracy to Cheat and Defraud Local 107	20
Conclusion	24

TABLE OF CITATIONS

Cases:

Ashe v. Valotta, 270 U.S. 424 (1926) 19

Beck v. Washington, 369 U.S. 541 (1962) 4

Commonwealth v. Carey, 201 Pa. Superior Ct. 292 (1963) 6

Commonwealth v. Cohen et al., 203 Pa. Super. 34 (1964) 3

Commonwealth v. Turner, 176 Pa. Superior Ct. 32 (1954) 19

Gideon v. Wainwright, 372 U.S. 335 (1963) 17

Glasser v. United States, 315 U.S. 60 (1942) 10, 15

Lem Woon, 229 U.S. 586 (1912) 4

Namet v. United States, 373 U.S. 179 (1963) 14

Rowand v. Commonwealth, 82 Pa. 405 (1876) 6

United States v. Amadio, 215 F. 2d 605 (C.A. 7th Cir. 1954) 14

United States v. Hiss, 185 F. 2d 822 (C. A. 2d Cir. 1950) 14

Pennsylvania Statutes:

Act of March 31, 1860, P.L. 427, §77, 19 P.S. 211 18

Act of March 23, 1877, P.L. 26, §1, 19 P.S. 212 18

Act of April 23, 1889, P.L. 48, §1, 19 P.S. 214 18

Act of June 24, 1895, P.L. 212, §7(e), 17 P.S. 190 .. 4

IN THE

Supreme Court of the United States

October Term, 1964

No. 419

BEN LAPENSOHN, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION FOR RESPONDENT, THE COMMONWEALTH OF PENNSYLVANIA

Respondent, the Commonwealth of Pennsylvania, prays that the Petition for a Writ of Certiorari to review the Order of the Supreme Court of Pennsylvania, entered on May 27, 1964, be denied.

STATEMENT OF THE CASE

Petitioner, Ben Lapensohn, is one of seven officials and employees of Local 107 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America who were indicted on September 18, 1959, for conspiracy to cheat and defraud that Union. After extensive pre-trial proceedings, six defendants were brought to trial on March 25, 1963, with the action being abated as to one

defendant who had died. Extensive evidence was presented by the Commonwealth in a trial that lasted ten weeks and one day in which ninety-eight witnesses testified and 1,116 exhibits were introduced into evidence. The printed record in the case, exclusive of exhibits, runs 4,540 pages. Neither defendant Lapensohn nor any other defendant took the stand. No evidence was presented on behalf of any defendant.

On June 3, 1963, the jury returned verdicts of guilty as to Petitioner as well as all other defendants. Petitioner Lapensohn, who was the second most important figure in the conspiracy, received the second most severe sentence which was ten months to two years in prison. Following the conclusion of the trial, this procedural timetable followed:

1. Arguments on post-trial motions were heard on July 10, 1963.

2. Petitioner's and the other defendants' post-trial motions were dismissed on July 15, 1963, and the judgments of sentence were imposed.

3. Defendants appealed to the Superior Court of Pennsylvania on July 15, 1963.

4. On July 19, 1963, and August 13, 1963, defendants filed petitions for continuance in the Superior Court. On July 19, 1963, and August 15, 1963, the Commonwealth of Pennsylvania filed Answers to those petitions opposing a continuance. The Superior Court denied both petitions for continuance*

* While Petitioner printed copies of the applications for continuance at pages 41a and 50a of the Joint Appendix to Petitions for Writ of Certiorari to the Supreme Court, Petitioners did not print the Commonwealth's Answers. So that this Court may have all the facts, the Commonwealth is including its Answers to those petitions in a separate Appendix to Briefs In Opposition to Petitions For Writs of Certiorari, which is being filed with this Brief.

5. The Superior Court of Pennsylvania heard argument for a full day on September 9, 1963 in a session which began at 10 A. M. and ended at 4:50 P. M. with no other case being heard on that day.

6. On March 19, 1964 the Superior Court of Pennsylvania affirmed the convictions by a six to one vote, and a comprehensive 37 page opinion was filed by that Court dismissing all of defendants' allegations of error. *Commonwealth v. Cohen et al.*, 203 Pa. Super. 34 (1964). One Superior Court Judge dissented on narrow state-law-substantive grounds that the prosecution was barred by the Pennsylvania Statute of Limitations.

7. After the Supreme Court of Pennsylvania refused, in its discretion, to review this case, the Petition for a Writ of Certiorari was filed.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. This Case Presents no Federal Question and No Important Issue of any Kind.

There is no legitimate federal question involved in this case. All of the issues raised by Petitioner in the Superior Court were argued in terms of substantive or procedural questions of Pennsylvania state criminal law. An examination of the specific issues raised in this Petition for Certiorari, set forth below, demonstrates that Petitioner is complaining about questions of state law which fall outside the ambit of jurisdiction of the Supreme Court of the United States.

As to the questions of state law, the Pennsylvania Superior Court has given this Petitioner and his Co-Defendants their full day in (the Appellate) Court. Their numer-

ous allegations of error have been comprehensively and conscientiously considered, and properly rejected.

The Pennsylvania Supreme Court refused to consider this case because there was not even any significant question of state law presented. Unlike the Supreme Court of the United States where four justices must concur before certiorari may be granted, the Pennsylvania Supreme Court will review a decision from the Pennsylvania Superior Court if any one of seven judges vote to do so. Pennsylvania Act of June 24, 1895, P.L. 212, §7(e), 17 Purdon's Statutes 190. The lack of substance in Petitioner's complaints is indicated by the fact that not one of seven Pennsylvania Supreme Court Judges thought this case was worthy of review by that Court.

This case involves only a misdemeanor on which a very moderate sentence was imposed, considering the nature of Petitioner Lapensohn's conduct proved on the single bill of indictment charging conspiracy to cheat and defraud Local 107 of the Teamsters Union. This Court should not take time from its busy, crowded schedule to review this case which has a record in excess of 4,500 pages, where the Pennsylvania Superior Court has given full consideration to all the allegations of error on a case which, realistically viewed, involves only state-law issues.

II. The Specific Reasons Advanced by Petitioner Do Not Justify Review by This Court.

A. *Petitioner's Rights Were Not Violated by Use of the District Attorney's Bill of Indictment Instead of a Preliminary Hearing.*

It has long been settled that a defendant has no constitutional right to a preliminary hearing. *Lem Woon v. Oregon*, 229 U.S. 586 (1912). And approval of the procedure of instituting a criminal action on information filed by the prosecutor without a prior judicial determination of probable cause was reaffirmed in *Beck v. Washington*, 369 U.S.

541, 545 (1962). Petitioner asserted that he had a right to a preliminary hearing under a Pennsylvania Act of Assembly, which is true as a general proposition subject to certain exceptions; and this case falls within one of the traditional exceptions under Pennsylvania law where no preliminary hearing need be held. The state law which governs the use of the District Attorney's Bill of Indictment is summarized in the opinion of the Pennsylvania Superior Court at pages 3a to 8a in the Joint Appendix to Petition. There is no reason to summarize or restate the Pennsylvania law reviewed by the Superior Court in their opinion in this case. Applying Pennsylvania law on this subject to this case, the Pennsylvania Superior Court concluded that the District Attorney's Bill of Indictment was properly used. There is no federal question involved no matter what contortions are attempted to mold this hollow complaint into a Fourteenth Amendment issue.

The proceedings in the Pennsylvania courts in this case, including the use of the District Attorney's Bill of Indictment, afforded Petitioner more than the minimum requirements of due process of law. As the record shows, Judge (then District Attorney) Victor H. Blanc obtained approval from the Court of Quarter Sessions, acting through President Judge Vincent A. Carroll, in securing permission to present evidence to the Grand Jury without a preliminary hearing (10a). Judge Carroll's review of the District Attorney's action afforded Petitioner his first line of procedural protection. The Grand Jury then heard evidence for two days before returning the indictment in this case. These proceedings were, of course, only the preliminaries. Defendants were then tried by judge and jury with all of the traditional procedural safeguards.

Petitioner's current contention of prejudice is a phantom. At no time in the long trial or afterward has Petitioner claimed that he was surprised by any evidence at all or pointed to any harm caused by the absence of a preliminary hearing. On the contrary, the record shows Petitioner re-

ceived notice, a chance to be heard, a full opportunity to defend himself and all the other procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment.

Petitioner Lapensohn further complains that his case was different from the other defendants in that there was no emergency as to him since the statute of limitations had tolled thereby allowing the prosecuting attorney four additional months in which to proceed against Lapensohn. Lapensohn did not raise this issue in the Trial Court. The Assistant District Attorney has searched his file, as well as his recollection, and can find no indication that Lapensohn ever raised the current issue before the Trial Judge in the Habeas Corpus Hearings in the way he is arg g it before this Court. Lapensohn alludes to having rai is issue by stating at page 28 of his Petition:

> "... this had been argued in a sup...nental brief filed with the Court."

The District Attorney's file shows no such Supplemental Brief; but more important it is not the Petitioner's Supplemental Brief which controls, but rather the petition and hearings which were made a part of the record in the lower court proceedings. Briefs are not a part of the record, and as such provide no record basis for raising and preserving legal issues in the trial courts. The Motion to Quash, which duplicated the Habeas Corpus Petition, did not raise the issue (19a-20a). The record in the Habeas Corpus Hearings shows this issue was not raised (54a-1152a). Thus, in the Habeas Corpus Proceedings in the Trial Court, Appellant Lapensohn contended that the bill of indictment was defective because the District Attorney's delay created the emergency and therefore the bill of indictment was improperly returned. At no time did Lapensonn contend that his situation was different from the other defendants because there was more time to hold a preliminary hearing as to him since the statute of limitations was tolled.

Considering the merits of this contention now raised by Lapensohn, the District Attorney's Bill of Indictment was properly returned as to Lapensohn under the settled law of Pennsylvania as set forth in *Rowand v. Commonwealth*, 82 Pa. 405 (1876) and *Commonwealth v. Carey*, 201 Pa. Super. 292 (1963) since the District Attorney did not abuse his discretion; and in any event, Lapensohn suffered no harm. The relative uncertainty of the proofs on Lapensohn's final participation in the conspiracy and on the specific dates when he was outside the jurisdiction created sufficient doubt so that the District Attorney was justified in proceeding against Lapensohn with a District Attorney's bill of indictment. While it was patently clear that Lapensohn was deeply involved in the conspiracy because of his participation in the Altered Kirsch Checks (PHASE 8, discussed at pages 15 to 16 of Lapensohn's Petition), the Missing Checks (PHASE 16, discussed at pages 19 to 20 of Lapensohn's Petition), the Katz Check (PHASE 6, discussed at pages 14 and 15 of Lapensohn's Petition,) the Kanner Checks (PHASE 7, discussed at page 15 of Lapensohn's Petition), The Food Fair Transaction (PHASE 20, discussed at pages 22 to 24 of Lapensohn's Petition), The Mastrin Diversion (PHASE 9, discussed at page 16 of Lapensohn's Petition), The Lazovitz-Marshall Matter (PHASE 10, discussed at pages 16 to 17 of Lapensohn's Petition), and The Insurance Payments (PHASE 5, discussed at pages 14 to 15 of Lapensohn's Petition),* the District Attorney could not be certain that Lapensohn's acts on September 14, 1956, or October 2, 1956, would stand up, in the face of all possible defenses, as conclusive acts in furtherance of the conspiracy.

Thus, it might have been necessary to rely on earlier acts in July or August 1956 which were not used at trial,

* In order to avoid lengthy summarizations of the evidence against Lapensohn, the Commonwealth has referred to the categories itemized in Lapensohn's Petition although those Summaries omit much of the damaging evidence against him.

such as certain Friedman checks. Similarly, the Commonwealth could not be certain, although it had reliable information, that it could conclusively prove that Lapensohn was outside Pennsylvania from May 1957 through July 1958. *Therefore, the dates of Lapensohn's last acts and the period when he was outside of the country presented the risk that the prosecution as to Lapensohn would be barred unless a District Attorney's bill of indictment were utilized.* It should be noted that these factors were not developed in detail at the proceedings in the Trial Court on the Habeas Corpus Petition because Lapensohn's counsel did not raise this issue.

In addition, the practical necessities of this case required treating Lapensohn the same as the other defendants. A preliminary hearing as to Lapensohn alone would have required virtually presentation of the entire Commonwealth's case or at least a major part of it as to Lapensohn as well as all the other defendants. If the District Attorney had proceeded against Lapensohn at a preliminary hearing without affording the other defendants the same procedural treatment, the Commonwealth would have run the risk of denying some of the defendants equal protection of the law.

In Lapensohn's Petition, at page 40, he cites the principle that if the statute of limitations ran against the other defendants, then Lapensohn could not be tried since he could not be found guilty of conspiring with himself. Had he been given a preliminary hearing by himself, he would have complained that he could not be prosecuted for conspiracy with himself. As a practical matter, the District Attorney had to treat the joint conspirators alike; and there was nothing in Lapensohn's situation which called for different treatment.

The unified nature of the case justified the District Attorney in treating Lapensohn the same as the other defendants. The conspiracy was a unified whole with Lapensohn being the second major conspirator based on all the

evidence. Proceeding alone against Lapensohn at a preliminary hearing would have injected many procedural and substantive problems. Accordingly, the District Attorney was justified in treating all the defendants equally. Therefore, the reasons which made the District Attorney's Bill of Indictment valid as to the other defendants apply as well to Lapensohn.

B. *Petitioner Was Not Deprived of a Fair Trial or a Fair and Impartial Arbiter.*

An examination of the record in this case shows that the Pennsylvania Superior Court was correct in evaluating the Trial Judge's conduct of the case at page 75 of 203 Pa. Super. as follows:

> "Other complaints were made as to the admission of testimony and the injection of the judge into the trial of the case and as to parts of the court's charge. To individually discuss each and every one of these matters would unduly prolong an opinion which is already too long. Suffice it to say that we have carefully reviewed each and every one of these contentions and we do not believe that, taken together or separately, they were sufficient to show that the appellants were unduly prejudiced."
>
> "We are convinced that Judge Ullman retained his composure exceptionally well in a long drawn out, hard fought trial. We are also convinced that the evidence was sufficient to justify the conviction of all appellants and that they received a fair trial."

The clue to this issue is, realistically viewed, conceded by Lapensohn when he states at page 28 of his Petition that the allegations of judicial impartiality may have been caused:

> ". . . by the efforts of counsel for the various defendants in attempting to protect to the fullest extent the respective and often adverse interests of their clients. . . ."

The assertion that the Trial Judge assumed the role of the prosecutor in the trial is preposterous. The record shows that the Trial Judge asked a very small number of questions for such a very long trial. At page 33, Lapensohn asserts that:

> ". . . the judge even instructed the District Attorney as to what questions he would allow the District Attorney to ask."

Such a statement is completely misleading. The Judge sustained Lazovitz' plea of privilege on most of the areas which the District Attorney wanted to cover. Therefore, the Court instructed the Prosecutor as to what questions could be asked. The Trial Judge was not functioning as the Prosecutor, but rather he was delimiting the Assistant District Attorney after overruling the Commonwealth's position.

When the Trial Judge commented that Mrs. Battisfore was "seriously threatened", counsel for Lapensohn knew precisely what the Judge was talking about. At page 34 of his Petition Lapensohn then states:

> "There is absolutely no evidence supporting any implication of impropriety or in any manner connecting appellant or any other defendant with such sinister conduct as hinted here."

That is an astounding misquotation of what occurred. The fact of the matter is that Lapensohn's Counsel was the one who hired a private detective to follow Mrs. Battisfore after the Court had ordered that no one should talk to or interfere with the witness during the recess while she was still subject to examination in court. When the Trial Judge mentioned the incident, outside the presence of the jury, it was Lapensohn's Counsel who rose to explain the situation (3482a-3483a); and at the further hearing, Lapensohn's Counsel conceded that he had requested the detective agency to follow Mrs. Battisfore (4607a-4655a).

The case, *Glasser v. United States*, 815 U.S. 60 (1942), is a leading case against Petitioner's argument. The con-

duct of the trial judge was first mentioned at 315 U.S. at page 82. The opinion sets out the duties of a trial judge, and his responsibilities, in familiar words, and then gives a listing of his alleged departure from the ideals set out. One is brought almost to the point of believing that Petitioner Lapensohn copied the list; which is worth repeating here: (pages cited at beginning of paragraph)

> "Petitioners contend that the trial judge made remarks prejudicial to them, committed acts of advocacy, questioned them in a hostile manner, unduly limited cross-examination, and in general failed to maintain an impartial attitude."

Although the incidents described and referred to seem to outweigh the claims here made, the highest Court brushed them aside at page 83 of 315 U.S.: .

> "The alleged undue limitation of cross-examination merits scant attention. The extent of such examination rests in the sound discretion of the trial court. Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624. We find no abuse of discretion."
>
> "Perhaps the court did not attain at all times that thoroughgoing impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the substantial rights of the petitioners were not affected. The trial was long and the incidents relied upon by petitioners few. *We must guard against the magnification on appeal of instances which were of little importance in their setting.* Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240, 60 S. Ct. 811, 852, 84 L.Ed. 1129; *Goldstein v. United States*, 8 Cir. 63 F. 2d 609; *United States v. Warren*, 2 Cir. 120 F. 2d 211." (Emphasis added)

In considering the conduct of the Trial Judge, we must bear in mind that the Petitioners were brought to trial only after almost 3½ years of continual struggle to avoid facing

a jury. Every delaying maneuver was used. On trial at last, the tactics were directed towards the goal of a mistrial, with the added maneuver of pseudo-conflicts among the defendants as to whether objections should be pressed on certain matters — all of which wound up with complete unanimity as to the motion for withdrawal of a juror.

The instances cited by Petitioner under this heading do not show partiality. The comment (apparently to the jury, after the conclusion of a conference in chambers) that the Court had just wasted another half-hour, applied to the prosecution as well as to the defense. The other instances are revealed upon examination to be mere shadow-boxing, ending with the inevitable motion for withdrawal of a juror, or efforts to get the trial back to an even tenor. At page 31 the Petitioner attempts to read into sua sponte interpositions by the Court during the examination or cross-examination of the witness, an effort by the Court to further the prosecution and to counteract the effect of cross-examination. No such inference can validly be deduced from the samples given, which we may assume, are those which Petitioner believes will best point up his argument.

Petitioner tries to build his theory upon the fact that, in the colloquy quoted at page 31, the Court volunteered the statement that if an objection were made to the question put by defense counsel, he would sustain it. The objection was made, and the reply of the attorney for Petitioner, "If your Honor please, all right", indicated that he agreed that his question was objectionable. He took no exception, but a moment later moved for the withdrawal of a juror. One fault of Petitioner's argument is that there is nothing in the passage to indicate that the action of the Court was helpful to the prosecution or was thus intended. Actually the Prosecutor may well have sat back in poker-faced satisfaction to have the question answered, even though objectionable; it might very well have opened the door to a re-direct examination upon a subject which he could not o herwise have pursued. Such incidents do happen, and did happen during the trial.

The next point of attack to be selected for quotation of tes mony involves the charge that the Court "cross-examined witnesses to minimize the effect of cross-examination by defense counsel and to rehabilitate their testimony." This is a most serious accusation, and one which should not be made without the gravest cause. The leading incident chosen for quotation is one in which counsel for Petitioner, rather than the Court, was at fault. Counsel sought to get into the jury by implication very much more than was warranted by the testimony of the hand-writing expert on direct examination. From the frank and scrupulously correct admission by the expert that he could not under oath identify the forged signature "Jerome S. Friedman" with the signatures of Lapensohn, Cohen or Grace, Counsel sought to draw a blanket exoneration over the defendants. It was perfectly proper for the Court to avert the confusion which might well have been raised in the minds of the jurors, through bringing out that the converse was likewise implicit in the answer, and that the witness was not completely placing the mentioned defendants beyond the reach of other testimony which might be introduced that one or more of the defendants had forged the signatures.

Lapensohn's petition at page 32-33 selects another passage for support of this contention. This is a trivial incident, in which the Court endeavored to clear up the meaning of the answer of a witness who, under cross-examination, was displaying a confusing lack of recollection as to what payments he had received for picket-duty. The witness was one of a series of witnesses on the same subject, and it would be ridiculous to conclude that any harm was worked against Petitioner. The mention of the witness Gorman reveals no partiality.

The third point which appellant urges under this heading is that the Court consulted with several witnesses "off record and without the presence of defense counsel, but in the presence of the jury." This contention was not pursued,

and the record shows that this exception was inconsequential.

Petitioner seeks to construct prejudicial error from the fact that the Trial Judge interrogated two prospective witnesses who, it is claimed, had indicated they intended to assert their privilege against self-incrimination. Petitioner concedes that absence of evidence that the witnesses were not called in good faith and that "their testimony was not essential to the case". Appellant cites in support of this claim of error *Namet v. United States*, 373 U. S. 179 (1963). The defense there relied upon prejudice arising from the refusal of witnesses to testify in a Federal gambling tax case. The Court found no error in the calling of the witnesses, saying:

> "In the first case, the record does not support any inference of prosecutorial misconduct. It is true, of course, that Mr. Fitzgerald [Attorney for both defendants and the witnesses] announced that the Kahns would invoke their testimonial privilege if questioned. But certainly the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous . . . We cannot find that these few lapses, when viewed in the context of the entire trial, amounted to planned or deliberate attempts by the government to make capital out of witnesses' refusal to testify . . ."

The opinion cites as cases which found no reversible error when such minor lapses occurred through a long trial; *United States v. Hiss*, 185 F. 2d 822 (C.A. 2d Cir. 1950); *United States v. Amadio*, 215 F. 2d 605, 614 (C.A. 7th Cir. 1954). The Court adds that even when the objectionable inferences might have been found prejudicial, it has been held that instructions to the jury to disregard them sufficiently cured the error.

The long list of record citations appearing on page 36 of the petition reveal nothing more serious than a momen-

tary impatience at the harassing tactics of defense counsel, obviously aimed at one more motion for a mistrial. Excerpts from a record cannot convey a true picture. As Mr. Justice Frankfurter said in his dissent in *United States v. Glasser*, supra, (315 U.S. at 88; 62 S. Ct. at 473) (dissenting from reversal as to Glasser) :

> "It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record."

Even a judge, placed on trial on a question of his impartiality, is entitled to have his actions judged in the light of time, place, circumstances. The Court here shows up in the record as worthy of the judgment that he acquitted himself well.

C. *Petitioner Was Not Deprived of Effective Assistance of His Counsel.*

Petitioner did not contend in the Suprerior Court that he was denied the effective assistance of counsel by the Superior Court's orders denying a continuance. Petitioner's efforts to now cast their request for a continuance in a constitutional setting is unfounded on the facts. There was ample time for the preparation of this case for argument in the Superior Court. The trial ended on June 3, 1963, and the argument in the Superior Court was held more than three months later on September 9, 1963. The case was heard in its regular turn in the normal processes of listings before the Superior Court.

The public's interest required a disposition of this case in the regular course of the listing of the cases, without a continuance, in view of the key officerships and positions held by four of the defendants. The Superior Court noted, with approval, Judge Gold's comment at page 42 of 203 Pa. Super. as follows:

> "'Local 107 is a gigantic union with more than 12,000 members situate in the greater Philadelphia area. Its immense economic influence in the transportation and allied industries is well known. We have been and are now of the belief that Local 107 is a strong, powerful, self-disciplined and militant labor organization, which concentrated in the field of transportation, is affected with a public interest no less than the utilities, railroads and trucking industry which it serves.'"

In view of the power of Local 107 in the economic life of the Philadelphia area and of the great influence of the defendants in that Union, it was necessary that the appeal be heard without a continuance and disposed of at the earliest date. The Superior Court processed this case like any other case on its list where convicted defendants remained on bail pending a disposition of their appeals.

The Commonwealth categorically denies Petitioner Lapensohn's theories that the post-trial timetable was characterized by "inordinate hate" or that such a sequence is atypical of cases in Pennsylvania, any state in the Union or any nation following Anglo-Saxon principles of jurisprudence. Such sweeping generalizations are obviously erroneous when compared with the chronology of events which show that the appellate argument was held more than three months after the conclusion of the trial. Petitioner sought a continuance on the argument that the record could not be printed in less than eight to sixteen weeks, and Petitioner now uses the absence of a printed record as the basis for alleged prejudice. When the Assistant District Attorney saw that allegation in the petition for continuance, he quickly found a printer who could reproduce the record in sufficient time as set forth in paragraph 8 of his sworn Answer. Petitioner further contends that defendants had only one typewritten copy of the record. The fact is that the defendants received a daily copy of the notes of testimony as the trial progressed which was photostated. This was

clearly visible in the course of the trial when some defense counsel displayed duplicate photostatic copies. These arguments are mere makeweights and constitute no showing of prejudice.

The record shows that there were nine attorneys who appeared for the six defendants. It is totally unfounded to contend that the mandate of *Gideon v. Wainwright*, 372 U.S. 335 (1963), is violated where such a battery of attorneys has three months to prepare for an appeal. Petitioner and his co-defendants criticized the District Attorney for his delay in the early stages of this proceeding, and then the defendants engaged in delaying tactics for approximately 3½ years before the case was brought to trial. Under those facts the prosecution was justified and, in fact, obligated to press for a prompt appellate disposition in accordance with the rules of court in a case which was so important to the Commonwealth of Pennsylvania.

The logic of Petitioner's argument on this issue, and in fact throughout his petition, is characterized by his assertion at page 38:

> "For the Supreme Court of the State thereafter to refuse to review the proceedings, even though issues raised were substantial enough to obtain a dissent in the Superior Court, practically amounts to an abandonment of its judicial obligation."

On the contrary, the refusal of the Pennsylvania Supreme Court to review this case indicates a total absence of merit in the allegations of error. As previously indicated, an appeal may be taken from the Pennsylvania Superior Court if any one of the seven judges of the Pennsylvania Supreme Court vote to do so. The failure of Petitioner to attract a single vote shows the lack of merit in the appeal rather than "abandonment of its (the Pennsylvania Supreme Court's) judicial obligation."

Parenthetically, it is interesting to note that while Petitioner argues that he did not have enough time to prepare

for the Superior Court argument, he uses the same arguments (although he now seeks to make constitutional issues out of them instead of questions of state law) and in many places Petitioner does not even change the prior language. For example, pages 48 to 58 of Lapensohn's Superior Court brief are reproduced almost verbatim at pages 28 to 37 of this petition. The quality of Lapensohn's Petition, which was present in the Superior Court, demonstrates that Petitioner had extremely able counsel.

D. *The Holding of the Superior Court on the Statute of Limitations Issue Does Not Violate the Fourteenth Amendment.*

Like all of Petitioner's complaints, this is solely a question of state law which has been decided with finality by the Pennsylvania Superior Court. The time established by the Statute of Limitations and the interpretation of that statute is obviously a matter of state law. If Pennsylvania wished, it could establish a five year statute of limitations for conspiracy as it has for certain other criminal offenses. Acts of March 31, 1860, P.L. 427, §77; March 23, 1877, P.L. 26, §1; April 23, 1889, P.L. 48, §1 (19 Purdon's Statutes 211, 212, 214). Petitioners could not realistically contend that their constitutional rights were violated by a longer statute of limitations. Similarly, there is no logical basis for their complaint that their constitutional rights were violated by the Superior Court's interpretation of what that statute means.

On the facts, the Superior Court was obviously correct for the reasons summarized in their opinion at pages 59 to 65 of 203 Pa. Super. A key check on the Local 107 Bank Account was cashed on September 19, 1957, by one of the co-conspirators or an agent for a co-conspirator. Morever, the evidence virtually demonstrated (and, in any event, was at least sufficient to support the jury's verdict) that co-conspirator Grace cashed the check himself on Septem-

ber 19, 1957. There are 222 checks in evidence where that bank required that bearer paper be endorsed by the person who received the cash. Thus, the evidence showed that Grace, one of the co-conspirators named in the indictment who died prior to trial, cashed the key check on September 19, 1957. That act was within two years of September 18, 1959, the time the bill of indictment was returned. As a matter of state law, it was the only sensible conclusion. Under any circumstance, such interpretation of the state statute of limitations could not conceivably be violative of the Fourteenth Amendment of the United States Constitution.

Similarly, Lapensohn complains in the Supreme Court of the United States that there was no proof that he was unavailable for service of process and such proof was necessary in Pennsylvania under *Commonwealth v. Turner*, 176 Pa. Superior 32 (1954). Here again, the question is obviously governed by state law and the state appellate courts of Pennsylvania have categorically rejected Lapensohn's contention. 243 Pa. at 65. The Pennsylvania Superior Court's interpretation on service of process is obviously not so lacking in the fundamentals of fairness as to be violative of the Fourteenth Amendment.

E. *Petitioner Was Not Prevented from Selecting a Fair Jury.*

Petitioner again seeks to cast a purely state question into a constitutional mold by contending he was denied equal protection of the law when the six joint defendants were allowed a total of six peremptory challenges. Petitioner's contention has no support in the United States Constitution, since there is no constitutional right to any peremptory challenges. It has long been settled that due process of law is not violated where a state limits the number of peremptory challenges. In *Ashe v. Valotta*, 270 U.S. 424 (1926), Mr. Justice Holmes, in interpreting a Pennsylvania statute on peremptory challenges in a murder case,

spoke for a unanimous Court which held that due process had not been denied, declaring: "That Pennsylvania could limit the challenges on each indictment to ten does not admit doubt." 275 U.S. at 426. Petitioner's sole basis rests on a Pennsylvania statute which allows peremptory challenges. Just as the state through such a statute may allow peremptory challenges, the state courts may interpret that statute and limit its scope as a matter of state law.

The practical necessity for such a rule is demonstrated by the fact that it took the better part of two weeks of a ten week trial to select a jury in this case. If the law had allowed thirty-six peremptory challenges for the six defendants, and the time of jury selection had proceeded *pro rata*, approximately twelve weeks would have been consumed in the selection of the jury alone. Here again, Petitioners showed no prejudice since they were able to make certain that they received a fair trial by eliminating any prejudiced juror on a challenge for cause following extensive *voir dire*. A great deal of the *voir dire* was not printed since it was completely uneventful (4539a). The portion which was printed shows that the defendants were able to select an impartial jury which is the only crucial factor (1210a-1365a). Thus, the issue of peremptory challenges was not determinative in providing Petitioners with an impartial jury and fair trial. Petitioner makes a general charge that he was limited on *voir dire* with no specific complaint to any designated portion of the record. On the contrary, the record at pages 1210a to 1365a show that Petitioner was accorded ample latitude on the questioning of prospective jurors on *voir dire*.

F. *The Evidence Conclusively Demonstrated Petitioner Was Guilty of Conspiracy to Cheat and Defraud Local 107.*

The resemblance between Ben Lapensohn and "Shuffling Sam" is fictional. This Petitioner has the temerity to contend that there was "no evidence" against him, a con-

tention which counsel for Petitioners Cohen, Hartsough, Elco, and Berman, (in companion petition No. 420) could not make without blushing. The argument of Petitioner Lapensohn on this issue is not even colorable. Of course, in the state court, Lapensohn contended that there was not sufficient evidence; but, as usual, Lapensohn now tries to cast the issue in a constitutional setting by the absurd contention that there was no evidence.

The record shows that Lapensohn was second only to Raymond Cohen in deep involvement in the conspiracy. The evidence demonstrated that Lapensohn was extensively involved in the conspiracy. He was a crucial figure in PHASES 5, 6, 7, 8, 9, 10, 16 and 20. Lapensohn's fraudulent activity is amply demonstrated by the fact that he was most closely connected with the evidence showing concealment, artifice and deception. These acts show that Lapensohn was the architect of the deceptive practices and was involved in seven of the ten areas of deceptive practices: his name was erased from the Kirsch checks in an effort to conceal; the ten missing checks were payable to Lapensohn; his invoice concealed the payment for insurance on Mrs. Cohen's Cadillac convertible; he was the principal deceptive actor in the Food Fair stock pay offs; he was involved in the Marshall concealment; he participated in pre-arranging Local 107 meetings and he was involved in the numerous uttering of forged checks. The following is a partial list of his acts in furtherance of the conspiracy:

(1) Six checks drawn on Union funds and paid to the order of Jerome S. Friedman in the total amount of $4,660.62 were shown to contain the forged endorsements of the payee and were cashed at the same bank and on the same day that Lapensohn made deposits to his personal account. Four deposits were in identical amounts; the remainder show a close relationship to the forged checks.

(2) Lapensohn arranged for insurance to be purchased and paid for with Local 107 funds for defendants' and Mrs. Cohen's personal use.

(3) Another Union check in the amount of $1,000.00 payable to Joseph E. Katz and containing the forged endorsement of the payee was cashed at the same bank and on the same day when Lapensohn cashed a $1,000.00 check and deposited $478.41 of the proceeds in his own account.

(4) A number of checks payable to and containing the forged endorsements of David Kanner were shown to have been cashed at the same bank where Lapensohn maintained an account. One of these checks in the amount of $1,750.00 was cashed on the same day on which Lapensohn was shown to have cashed a check for an identical sum. One of the forged Kanner checks was for $2,500.00 dated April 11, 1956 (X-27). According to Marjorie Battisfore, Lapensohn was given a $2,500.00 check payable to David Kanner for transmittal in April, 1956.

(5) Lapensohn received $1,000.00 out of a Local 107 check for $2,500.00 (Ex. 43) payable to Philip Mastrin, architect of the Local 107 building constructed in Wilmington, Delaware.

(6) The following securities were received by Lapensohn or his straw shortly after Local 107 gave up trailer drops to Food Fair Stores, Inc.:

a. Two thousand shares of Food Fair Properties common stock were acquired for $1.00 per share at a time when the market price was 3½ to 3⅞. Stock was issued in the name of a straw, Jack Shore, who is Lapensohn's brother-in-law, and who had been supplied with funds by Lapensohn;

b. Two hundred units for bonds and the common stock of Food Fair Properties, Inc. were purchased by Shore with Lapensohn's funds at a price substantially below market;

c. Lapensohn purchased five hundred shares of Dan River Mills common stock for $10,000.00 during a period when these securities were trading for approximately $30.00 per share.

All of the above securities were made available to Lapensohn by Louis Stein who was President of Food Fair Stores, Inc.

(7) Four checks totalling $11,847.95, issued by the Union to the order of M. M. Marshall & Company, Inc., which constructed a building for Local 107 in Wilmington, Delaware, were not entered on the books of Marshall. One check in the amount of $2,967.95 (Ex. 472) contained the forged endorsement of the payee and had been cashed on the same day and by the same teller who handled a deposit in Lapensohn's account. Another check in the amount of $4,800.00 was also cashed under similar circumstances. This latter item did not appear in the Company's receipts ledger and although it is entered in the summary of buildings and receipts, this entry was shown to be an alteration. Finally, the other two checks in the respective amounts of $3,125.00 and $955.00 had been cashed on the same day and by the same teller who handled a deposit to Lapensohn's account and who cashed a check payable to and containing the forged endorsement of David Kanner.

(8) Ten checks totalling $9,523.7[illegible] payable to Ben Lapensohn for "Personal Services" and "Services Rendered" were shown to be missing from the Union's records. Moreover, the Locals' checks did not contain vouchers in support of these items. Three other similar checks totalling $2,662.50 for "Personal Services" were found to bear Lapensohn's endorsement. There were no vouchers for the latter three checks.

(9) Local 107 drew two checks to the order of Samuel Kirsch. One check in the amount of $4,500.00 contained erasures of the notation "OK by L. L. Lapenson of Teamsters Lo" and the other, a $4,000.00 check, contained erasures of the notation "OK identity by Lapenson of Teamsters Lo 107". The two checks were presented, cashed and paid out of 107's funds. Mr. Kirsch, who died on April 8, 1958, had been a salesman of Rolee Advertising Agency which was controlled by Lapensohn.

CONCLUSION

The full involvement of Petitioner Lapensohn can be appreciated only by detailed review of the record. This Petitoner has no justification for asking this busy, overworked Court to review a 4,500 page record for him on the basis of the very general assertions set forth at page 46 as follows:

> "The Superior Court merely sets forth the summary of the evidence, in many instances misinterpreting the facts or drawing inferences not justified by the facts, and simply concludes that the evidence was sufficient to sustain the convictions."

Without specifying the Superior Court's misinterpretations, Petitioner calls upon this Court to ferret them out. A search for such alleged misinterpretations will result in the Commonwealth's benefit in leading to an examination of the record which conclusively demonstrates that Petitioner and his co-defendants were guilty and that all received a fair trial.

Notwithstanding Petitioner's repeated efforts, he has merely raised a series of state-law questions which have been decided with finality by the Pennsylvania Superior Court. There is not even a federal question, let alone a meritorious one which justifies review by the Supreme Court of the United States. Accordingly, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

ARLEN SPECTER
Assistant District Attorney
F. EMMETT FITZPATRICK, JR.
First Assistant District Attorney
JAMES C. CRUMLISH, JR.
District Attorney